STATE OF MICHIGAN

IN THE SUPREME COURT

SONG YU and SANG CHUNG,

Plaintiffs-Appellees,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, a Michigan insurance company,

Defendant-Appellant.

Supreme Court No. 155811
Court of Appeals No. 331570
Ingham Circuit No. 14-1421-CK

DEFENDANT-APPELLANT FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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REPLY LAW AND ANALYSIS

A. Plaintiffs' argument illustrates the need for this Court to re-visit estoppel standards.

Rather than rebut the need for resolution, plaintiffs' answer to the application illustrates why leave to appeal should be granted. The recurring theme of plaintiffs' argument is that Farm Bureau should have to pay them benefits not provided by the policy but through estoppel because (a) Farm Bureau did not ask the magic question, i.e., were plaintiffs moving from *that* house; (b) Farm Bureau, unknowingly operating on only the partial facts conveyed by plaintiffs, paid their first water damage claim (which itself would not have been paid had plaintiffs disclosed that they had not occupied the house for three years); and, (c) Farm Bureau, with no actual knowledge that plaintiffs had moved, automatically renewed their policy (yet, less than a month later issued a cancellation upon learning that plaintiffs no longer occupied the house, thus indicating no intent to waive policy provisions).[1]

The unspoken elephant in the corner that plaintiffs hope this Court will overlook is that plaintiffs were in possession of the policy containing the increase in hazard provision, which stated that an unoccupied house meant no coverage, and only plaintiffs possessed all the facts, including pertinently that they had moved from the house in 2010. While plaintiffs assert that no provision in the policy required them to notify Farm Bureau that they had moved (yet assert that Farm Bureau is being disingenuous for pointing to the proof of loss provision containing such a requirement when no proof of loss was requested as to the February claim),[2] they fail to acknowledge that the proof of loss provision put them on notice that a change of address must be reported. They further fail to

[1] Answer to the application, pp 1, 4, 6, 17, 20-21, 25, 29, 31-32, 36, 39.
[2] Answer to the application, p 29.

acknowledge that the increase in hazard provision put them on notice that they had no coverage once they did move, whether they notified Farm Bureau or not, and that this provision belies their claim that they had no reason to mislead the adjuster at the time of the February claim.[3] They had every reason to mislead the adjuster because otherwise their February claim would not have been paid. Although small in hindsight compared to the $80,636.37 December claim, the February 2013 claim was $4,017.92 (not including the deductible), not a small amount of money.[4] Plaintiffs' argument that they were not required to report the 2010 move amounts to nothing more than "I was allowed to prevaricate at will because the policy did not tell me I could not."

If estoppel should apply to anyone, it should apply to plaintiffs. (a) They had *actual knowledge* of all the facts (particularly that they had moved from the house in 2010, and that their policy did not cover unoccupied houses). *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). (b) They falsely represented or concealed the fact that they had moved from the house in 2010 when they informed the adjuster that they *were moving*. *Id.* (After all, if they did not intend to falsely convey that they were moving from *that* house, why did they even mention that they were moving when the adjuster visited?) (c) They expected Farm Bureau to rely on these representations when they advised that they were in the process of moving. *Id.* (While plaintiffs assert that they had no motive to mislead the adjuster, they most certainly did because they wanted their February claim paid). (d) Plaintiffs' misrepresentations induced Farm Bureau to believe that coverage was owed for the February claim on the basis that that house had not been unoccupied for more than 60 days. *Morales v Auto-Owners Ins Co,* 458 Mich 288, 296-297; 582 NW2d 776 (1998).

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[3] Answer to the application, p 5.

[4] See Activity Log, attached as Exhibit I to Farm Bureau's application for leave to appeal.

(Their statement that they were moving clearly conveyed that *that* house had recently been occupied). (e) Farm Bureau justifiably relied on plaintiffs' misrepresentations when it paid plaintiffs' February loss claim. *Id.* (f) Farm Bureau was prejudiced because it was first bamboozled into paying the February loss claim and is now being forced to pay the December loss claim contrary to the express terms of its policy.

B. Plaintiffs' arguments are fraught with inconsistencies and flawed analysis

Plaintiffs' arguments are riddled with inconsistencies. First, plaintiffs state that they are not relying on the doctrine of waiver in their claim of estoppel.[5] Yet the very case plaintiffs relied on in the Court of Appeals, and the very case the Court of Appeals cited to reverse the trial court's ruling pertained heavily to waiver, and indicated that the two concepts were intertwined.

> In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a *waiver* of the forfeiture . . . the test is whether the insurer, by his course of dealing with the insured . . . has induced in the mind of the insured an honest belief that the terms and conditions of the policy . . . will not be enforced . . . and *when such belief has been induced*, and the insured has acted on it, *the insurer will be estopped* from insisting on the forfeiture. [*Morales*, 458 Mich at 296 (emphasis added).]

And plaintiffs even note in their answer to the application that *Morales* stated that estoppel "has been applied to prevent an insurer form enforcing a provision contained in an insurance contract *where the insurer waived its right* to assert the provision through its course of conduct."[6] Plaintiffs studiously avoid a waiver analysis because Farm Bureau demonstrated it had no intent to waive policy conditions when it cancelled the policy upon receiving actual knowledge that plaintiffs were not living in the house and had put it up for sale.

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[5] Answer to the application, pp 37-38.
[6] Answer to application, p 39.

Second, plaintiffs correctly note on page 35 of their brief, albeit without citation to authority, that when a contract supplies a definition for a term, it is inappropriate to consult a dictionary for the definition. Cf. *Cavalier Mfg Co v Employers Ins of Wausau (On Remand)*, 222 Mich App 89, 94; 564 NW2d 68 (1997). However, while plaintiffs urge a contract definition for occupied on page 35, plaintiffs cite on page 34 the definition of occupied from *Merriam Webster's Dictionary* as the appropriate definition to apply. The *policy* defines "occupied" to mean "being lived in with regular and continuous legal presence of human inhabitants."[7] Plaintiffs assert that the dictionary definition, "to reside in as an owner or tenant," somehow supports their position that *legal* presence does not mean *physical* presence.[8] There is no basis for this conclusion. "Reside" is defined in the *American Heritage Dictionary* as "to live in a place permanently or for an extended period." "As an owner or tenant" indicates a legal right to be there, whether through deed or lease. Thus, the dictionary definition supplied by plaintiffs is consistent with the policy definition, which requires living in the place legally. Both elements are required. One cannot be a squatter and claim entitlement to coverage. Nor can one own but not live there and claim entitlement to coverage. There is no support for plaintiffs' proposition that they could "occupy" the house simply by owning it and without living there.

Plaintiffs argue that they understood that the $100.19 in retained premium was Farm Bureau's charge for insuring the home from December 8, 2013 to January 18, 2014.[9] However, they

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[7] Policy, form GH 65 01 10 10c, p 3 of 19. Analysis of this provision and other supporting contractual provisions was provided on pages 24 through 26 of the application for leave to appeal.
[8] Answer to application, p 34.
[9] Answer to application, p 10.

also claim that they did not get the cancellation letter until after the December 25, 2013 loss.[10] So which is it? They can hardly claim that they relied on the retention of premium if they had not received the cancellation letter. If they did not receive the cancellation letter, then how is this any different from any other denial of claim under the increase in hazard provision when a policy is in effect? The retention of premium is a red herring argument, which was dispelled in Farm Bureau's application for leave to appeal on page 10, note 42.

Plaintiffs assert that Farm Bureau's conclusion the house was vacant and unoccupied was rebutted by Song Yu's testimony on pages 29-33, 37-39 and photographs taken on December 27, 2013.[11] Even a casual review of the cited testimony dispels any conclusion that plaintiffs occupied the house under the standards of *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155; 534 NW2d 502, 504 (1995), and *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619, 623 (2010). Song Yu estimated that he visited the house 10 times a year, rarely spent the night, and spent the night only once or twice during the summer of 2013.[12] He further testified that most of his mail came to his East Lansing address, he was registered to vote in East Lansing, and he had no ties to Portage.[13] Plaintiffs' argument that their sporadic and occasional use of the house was sufficient to constitute "being lived in with regular and continuous legal presence of human inhabitants" is unsuccessful.

Whether belongings packed in a garage and an air mattress kept in a closet are sufficient to conclude that the house was not vacant need not be decided because the increase in hazard provision lists vacancy and unoccupied in the disjunctive:

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[10] Answer to application, p 5.
[11] Answer to application, pp 15-16, 26-27, 35-37.
[12] Song Yu EUO, 32-37.

> [W]e will not be liable for loss occurring * * * while a described building . . . is vacant beyond a period of 60 consecutive days ***or*** is unoccupied beyond a period of six consecutive months.

When phrases are separated by the disjunctive "or," only one of the conditions must be met. *Badeen v. PAR, Inc.*, 496 Mich. 75, 84 n. 17, 853 N.W.2d 303 (2014) (noting that, because the phrases in the statute defining a collection agency are separated by the disjunctive "or," "a person need only engage in *one* of the enumerated actions to satisfy the statutory definition").

Nevertheless, plaintiffs' assertion that the house was furnished and not vacant countermands their criticism of Farm Bureau's adjuster for assuming that they were moving from the Portage house in February 2013 when they told her they were moving. Song Yu stated that they left everything behind, and almost all furnishings were in the house when they moved to East Lansing (in 2013).[14] He stated that they moved the furnishings to the garage after the realtor told them to in order to sell the house.[15] He further testified that he met with the realtor about the time that the February 2013 leak was discovered, and the house was first listed for sale about June 2013.[16] Thus, at the time Farm Bureau's adjuster visited the house, the house *was* furnished. There would have been no reason to conclude that plaintiffs were moving from anywhere *but* that home.

While plaintiffs continually assert that Farm Bureau renewed the policy (an automatic process) after it learned that plaintiffs "were moving," they do not address any of the case law in Farm Bureau's application for leave to appeal,[17] which holds that statements of future intent do not

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[13] Song Yu EUO, pp 38-39.
[14] Song Yu EUO, pp 29-30.
[15] Song Yu EUO, p 30.
[16] Song Yu EUO, pp 19, 40-41.
[17] See Application, pp 22-23.

constitute a completed act. Plaintiffs tacitly admit by not rebutting the fact that they did not notify Farm Bureau of their move.[18]

Although plaintiffs claim they would be prejudiced if their second water loss claim is not paid, they have already received benefits they were not entitled to receive as a result of their concealment of the fact that they moved three years prior to the first loss. Farm Bureau has done nothing wrong. It paid plaintiffs' first claim based on their representation that they were moving. Farm Bureau should not be punished for doing right by its insured, when its insured is the cause of the erroneous first payment.

C. Plaintiffs' attempts to discredit authority cited by Farm Bureau are unavailing.

Plaintiffs attempt to distinguish *Heniser* on the basis that the policy in *Heniser* contained a provision requiring the insured to notify the insurer of any changes in title or occupancy. In making this argument, plaintiffs misread the significance of the notification provision in *Heniser*. In *Heniser*, the insured argued that this provision created an internal inconsistency in the policy. This Court not only disagreed with the insured's argument, it found the notice requirement insignificant to its analysis of whether the policy's definition of "residence premise" provided coverage for destruction of the building:

> The policy is not internally inconsistent. Although the conditions section of the policy requires the insured to notify the insurer of any "changes in title or occupancy of the property during the term of the policy" before recovering for any loss, this provision does not conflict with the definitions section mandate that the insured reside at the property. The requirement in the conditions section simply allows the insurance company to guarantee that the insured had an insurable interest in the property at the time of the loss or to coordinate coverage with other potential insurers. [*Id.* at 162.]

[18] See supported facts in application, p 6.

Thus, plaintiffs' distinction here is one without a difference.

Plaintiffs next attempt to distinguish *McGrath* on the basis that *McGrath* did not involve a claim of equitable estoppel. This distinction too is irrelevant. Farm Bureau cited *McGrath* for its interpretation of an identical contract provision, i.e., the definition and import of the phrase, "where you reside."[19] Plaintiffs make no attempt to explain how the presence or absence of an equitable estoppel claim would vary this interpretation. Equitable estoppel generally will not be applied to broaden the coverage of a policy to protect against risks that were not included in the policy. *Kirschner v. Process Design Assoc., Inc.*, 459 Mich. 587, 593–594; 592 N.W.2d 707 (1999). It cannot create a contract that the parties did not enter into or impose liability contrary to the express terms of the contract to which the parties did agree. *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 654; 177 NW 242 (1920). There is no basis to disregard *McGrath*'s contract interpretation analysis merely because the insured there did not attempt to invoke nonexistent coverage by estoppel.

It is unclear the point plaintiffs try to make on pages 33 and 34 of their brief by citing dicta in a footnote in *McGrath*. The *McGrath* claimant had argued in response to the summary disposition motion that the renewal policy was a different policy. The Court of Appeals noted Justice Levin's dissent in *Heniser* that if the insured lived at the house at the time the policy was issued, the insured might have reasonably believed he was covered for the entire policy period. The Court of Appeals stated that *even if it had subscribed* to Justice Levin's analysis, that would mean that the plaintiff had to live at the house when the policy was issued (which she did not and had not for two years). Nevertheless, because the Court of Appeals had concluded that the plaintiff had to live at the house when the loss occurred, and the plaintiff had not, the Court of Appeals declined to address the issue.

It appears plaintiffs here are attempting to argue that because they misled Farm Bureau's adjuster into thinking they still resided at the house but were moving, that Farm Bureau should not be able to deny coverage because it automatically renewed the policy? Even if the undersigned could understand the correlation plaintiffs attempt to draw, their argument is still based on dicta, which referred to a dissenting opinion, neither of which is binding precedent. *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999); *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976)

While plaintiffs go to great lengths to distinguish *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513; 773 NW2d 758, 760 (2009),[20] Farm Bureau has not relied on this case in this Court.

CONCLUSION AND RELIEF REQUESTED

Leave needs to be granted to clarify that all elements must be met to invoke equitable estoppel. When all the elements are combined, the test for estoppel should read as follows:

> (a) Actual knowledge of all the facts on the misrepresenter's/concealer's part; (b) A false representation or concealment by the misrepresenter/concealer. (c) Expectation that the other party will rely on the representation. (d) The misrepresentation induced the other party to act on the misrepresentation. (e) Justifiable reliance on the misrepresentation by the other party. (f) Prejudice suffered by the other party.

When all the elements are applied, it is clear that Farm Bureau should not be estopped to deny coverage. Farm Bureau requests that this Court grant leave to appeal to clarify the elements of equitable estoppel, limit the implications of *Morales*, and clarify when or even whether equitable estoppel may be invoked to vary the express terms of a written contract.

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[19] Application for leave to appeal, p 25, 27-29.

Respectfully submitted,

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Dated: July 21, 2017

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[20] Answer to application, p 35.